BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASON M. MORRISON	)	
Claimant	)	
	)	
VS.	)	
	)	
O'NEIL RELOCATION KANSAS CITY, INC	)	
Respondent	)	Docket No. 1,049,067
	)	
AND	)	
	)	
VANLINER INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 19, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

ISSUES

Claimant alleges that on October 15, 2009, he injured his right upper extremity while working for the respondent, O'Neil Relocation Kansas City Inc.[1] In the May 19, 2010 Order, the ALJ authorized Dr. Larry Frevert to treat claimant and, therefore, the ALJ impliedly found that claimant worked for respondent as an employee rather than as an independent contractor.

Respondent and its insurance carrier argue claimant was an independent contractor and cite the following reasons: (1) claimant had earlier worked for respondent as an employee, when he was paid by the hour and had taxes withheld from his checks; (2) on the date of accident claimant was being paid by the mile plus he received a set fee for loading; (3) claimant was hired as an independent contractor and considered himself to be

[1] The ALJ's Order and the transcripts show O'Neil Relocation of Kansas City, Inc., as the employer. But the claimant's brief to the Board shows *O'Neill* Van Lines as the employer. Nevertheless, respondent's identity has not been raised as an issue at this juncture of the proceeding.

an independent contractor; (4) he completed a form W-9 stating he was an independent contractor; (5) he was free to work for whomever he pleased and claimant was likewise free to decline the Nebraska Furniture Mart run; (6) he was free to choose his routes for delivering furniture; (7) respondent did not tell claimant how to load the furniture; (8) the work claimant performed was no different than that of other independent contractors who were hired to make Nebraska Furniture Mart deliveries; and (9) respondent did not exercise or have the right to control and supervise claimant's work. In short, respondent and its insurance carrier maintain the preliminary hearing Order should be reversed.

The claimant argues it is undisputed he worked for respondent as an employee before he was incarcerated and that after being released he was told respondent could not rehire him as an employee due to his criminal record. And although respondent called him an independent contractor, claimant maintains he was doing the same work he was doing when he was considered an employee. Moreover, claimant alleges (1) respondent told him when to report to work; (2) respondent provided the delivery truck; (3) respondent provided the dollies used to load the truck; (4) respondent planned the route for the furniture delivery and the order of the deliveries; (5) respondent controlled whether other workers were hired to help unload the truck and respondent paid those workers; (6) claimant was paid a fee for loading the truck, for mileage, and for each delivery; (7) respondent could have terminated him at any time; and (8) the work claimant performed was a part of respondent's regular business. Accordingly, claimant requests the Board to affirm the preliminary hearing Order.

The only issue before the Board on this appeal is whether claimant was injured while working for respondent as an employee or an independent contractor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds that the May 19, 2010, preliminary hearing Order should be affirmed.

Respondent is a moving company. Claimant worked for respondent's predecessor (Seaton Van Lines) before being incarcerated. After being released from prison in December 2006, claimant contacted respondent or its predecessor about returning to work at the moving company. Claimant was told he could not be hired as an employee because he would not pass the company's background check due to his criminal record. Nonetheless, claimant was told he could work as an independent contractor. Consequently, claimant resumed working as a mover in either late 2006 or early 2007. The record is not clear when respondent took over Seaton's operations.

Respondent had a contract with Nebraska Furniture Mart to deliver furniture to its customers. And in December 2008, claimant was assigned to that job. About twice a month claimant and a driver (who was an employee of respondent) picked up one of respondent's trucks in Olathe, Kansas, which they drove to Omaha, Nebraska, and loaded

it with furniture. They then delivered the furniture across the nation, picked up merchandise returns, dropped off the returns in Omaha, and returned the truck to respondent's facilities in Kansas. The trips usually lasted around two weeks. Claimant estimated that he worked that job approximately 28 days a month.

In addition to providing the truck, respondent paid or provided for such things as dollies, fuel, tags, and truck maintenance. Claimant testified that respondent told him where and when to report to work and that respondent's dispatcher planned their route. Occasionally, and only with respondent's permission, claimant hired others to help unload a delivery. And respondent paid those workers. Claimant was paid weekly and received 22 cents per mile, a loading fee, $30 for each drop, and $40 per day. No taxes were withheld from claimant's checks.

Claimant admits he understood that he was being hired as an independent contractor. He also admitted that as an independent contractor he could decline any job that respondent offered him, and that he knew respondent was not obligated to use him for the Nebraska Furniture Mart deliveries. Finally, he acknowledged that as an independent contractor he was free to work for whomever he desired and, in fact, had worked for at least two other companies since October 2009, when he last worked for respondent.

Claimant maintains he injured his right upper extremity on October 15, 2009, while loading a heavy buffet armoire into the truck and later while moving the buffet into a house in the St. Louis area. He also contends that he reported the injury to respondent shortly after they had unloaded the buffet. Claimant was told to take it easy and report back to respondent once they completed their deliveries. At this juncture respondent and its insurance carrier do not dispute those allegations.

Claimant completed his trip on a Friday night approximately a week after the accident. Respondent's offices were closed and, therefore, claimant sought medical treatment at an emergency room, where he was given a splint, medications, and placed on light duty for a right shoulder sprain.

At his attorney's request, claimant was evaluated in March 2010 by Dr. Michael J. Poppa. Dr. Poppa believes claimant may have adhesive capsulitis in his shoulder and a torn rotator cuff with impingement.

It is often difficult to determine whether a person is an employee or independent contractor for purposes of the Workers Compensation Act because the relationships share

similar elements.[2] In short, there is no absolute rule for making that determination.[3] The relationship between the parties depends upon all the facts and circumstances and the label they employ is only one of those facts. In other words, the terminology used by the parties is not binding.[4]

The primary test used by the courts in examining the relationship between parties is whether the employer had the right of control and supervision over the worker or the right to direct the manner in which the work was to be performed. It is the existence of the right or authority to control, not the actual interference or exercise of control, that renders one a servant rather than an independent contractor.[5]

In addition to the right to control or discharge a worker, there are other commonly recognized characteristics of the independent contractor relationship:

(1) the existence of a contract to perform a certain piece of work at a fixed price;
(2) the independent nature of the worker's business or distinct calling;
(3) the employment of assistants and the right to supervise their activities;
(4) the worker's obligation to furnish tools, supplies, and materials;
(5) the worker's right to control the progress of the work;
(6) the length of time that the worker is employed;
(7) whether the worker is paid by time or by the job; and
(8) whether the work is part of the regular business of the employer.[6]

After carefully considering the above factors, the undersigned Board Member finds and concludes that for purposes of the Workers Compensation Act the claimant should be considered an employee of respondent. As a practical matter, claimant's job duties did not change from what they had been as an employee. Furniture delivery was part of the regular work performed by respondent. And respondent furnished the truck, equipment, fuel, tags, and whatever else was needed to make those deliveries. Respondent also approved and paid the wages of helpers whenever they were needed at a home delivery. Finally, respondent had the authority to discharge claimant.

In summary, the May 19, 2010, Order should be affirmed.

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[2] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[3] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[4] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[5] *Wallis*, 236 Kan. at 102-103.

[6] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 19, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[7] K.S.A. 44-534a.

[8] K.S.A. 2009 Supp. 44-555c(k).